

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOHN J. LAMMACKER, and
EDWARD L. FRANK,

Plaintiffs,
vs.
AMERICAN FARM BUREAU FEDERATION,
Defendant.

Comes now the Plaintiff and moves the Court for an order

granting the Plaintiff's motion for summary judgment, and
for an order of summary judgment, and for an order of summary judgment,
and for an order of summary judgment.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 89-1905

WISCONSIN PUBLIC INTERVENOR AND TOWN OF CASEY,
Petitioner,
v.

RALPH MORTIER, and
WISCONSIN FORESTRY/RIGHTS-OF-WAY/TURF COALITION,
Respondents.

On Writ of Certiorari to the Wisconsin Supreme Court

**BRIEF FOR AMICUS CURIAE
AMERICAN FARM BUREAU FEDERATION
IN SUPPORT OF RESPONDENTS**

American Farm Bureau Federation (AFBF) hereby submits its brief *amicus curiae* in favor of the position of Respondents. Letters from the parties consenting to filing this brief *have been filed* with the Clerk of the Court per Supreme Court Rule 37.

INTEREST OF THE AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary non-profit, general farm organization incorporated in 1920 pursuant to the laws of the State of Illinois. AFBF's purposes are to promote, protect and represent the business, economic, social and educational interests of farmers and ranchers across the United States and to develop agriculture. As the largest general farm organization in the nation, AFBF has member state Farm

Bureau organizations in all 50 states and Puerto Rico, representing 3.8 million member families. AFBF's farmer and rancher members produce virtually every kind of agricultural commodity produced in the United States.

Farm Bureau members have a direct and vital interest in the outcome of this case. Federally registered pesticides constitute an important and integral role in production agriculture by protecting crops from damage or destruction caused by pests and weeds.

Uniform pesticide regulation is essential for farmers and ranchers to maintain economically viable operations. Orderly and uniform regulation of pesticide use on farmlands is of paramount importance to producers whose farms and ranches often span more than one municipal, township, or county jurisdiction. Agricultural producers nationwide will be adversely affected by restrictive ordinances like that of the Town of Casey which impose significant and burdensome requirements on producers that make it difficult—if not impossible—to efficiently farm. To the extent such local ordinances would prohibit all pesticides, even though federally approved, producers would be unreasonably denied an important production tool.

Of perhaps even greater concern are the compliance problems created by multiple local ordinances that not only conflict with federal law but conflict with each other. Such a result would render unworkable the planning, managing and coordination of farming and ranching operations. Accordingly, Farm Bureau members have a strong interest in ensuring that their livelihoods are not subjected to the uncertainty and vulnerability that flows from regulatory schemes such as Casey's.

SUMMARY OF ARGUMENT

Through the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), Congress sought to provide a comprehensive pesticide regulatory system that balances

the risks and benefits of pesticides and makes registration, use, labeling and cancellation decisions on the basis of sound science. Furthermore, Congress clearly provided that there was to be a "uniformity of regulations" (7 U.S.C. 136t(b)) with respect to pesticides.

The Casey ordinance destroys the uniformity of the FIFRA regulatory system by establishing its own independent pesticide regulatory scheme.

The ordinance places exclusive control of pesticide use decisions with the Town Board. Rather than balancing risks and benefits, the Board can grant or deny pesticide use on any ground.

The issue in this case is whether FIFRA pre-empts the Town of Casey ordinance.

Federal law can pre-empt state or local law if Congress indicates an intention to occupy a given field, *Pacific Gas & Electric Co. v. State Energy Resources Conservation Dev. Commission*, 461 U.S. 1990 (1983) and local law seeks to regulate the same field. As an independent pesticide regulatory scheme, the Casey ordinance seeks to do at the local level what FIFRA does at the national level—regulating pesticides within its jurisdiction.

Federal law may also pre-empt local law if the local law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Casey ordinance: (1) allows pesticide use decisions to be made without reference to federal or state "risk-benefit" considerations; (2) allows decisions to be made on grounds that are not science based; and (3) makes it unduly burdensome for farmers, ranchers and other applicators to use or even apply for use of pesticides in Casey.

If there remain any doubt about whether FIFRA pre-empts local pesticide regulation, resort to the legislative

history of FIFRA is appropriate. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). That history indicates that specific legislative language that would permit local pesticide regulation was introduced in both the House of Representatives and in the Senate. In both chambers, the provision was expressly defeated in Committee with a reasoned explanation provided in the Committee reports. There can be no doubt that local pesticide regulation was debated in both chambers, and defeated in each.

ARGUMENT

I. FEDERAL PESTICIDE REGULATORY SCHEME

"Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to regulate the use of pesticides in this country." *Defenders of Wildlife v. Administrator*, 882 F.2d 1294 (8th Cir. 1989). As such, FIFRA provides a comprehensive regulatory framework for registration, labeling, sale, use and cancellation of pesticide products. *Id.*; *Ruckelshaus v. Monsanto*, 467 U.S. 986, 991 (1984). In 1972, Congress "transformed FIFRA into a statute that cast a regulatory net over pesticides and their use, in part by giving the EPA enforcement authority over the use, sale and labeling of pesticides." *Professional Lawn Care Association v. Village of Milford*, 909 F.2d 929, 933 (6th Cir. 1990).

Title 7 U.S.C. 136a provides a comprehensive scheme for registration of pesticides. The applicant is required to submit data on the safety and efficacy of the product to the Environmental Protection Agency (EPA). This data is provided by the manufacturer. EPA will register a product if "when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment."¹ The process is one of weighing the risks and the benefits of the pesticide.

¹ 7 U.S.C. 136a(5).

That same section provides:

"The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide. Where two pesticides meet the requirements of this paragraph, one should not be registered in preference to the other."

No pesticide product may be sold unless it is registered. 7 U.S.C. 136a(a).

Instructions for the safe use of a pesticide product are also part of the registration process. These instructions are conveyed to product users such as farmers by means of a "label." The label provides instructions on such things as what crops the pesticide may be used on and what pests it controls, method of application, safety instructions, maximum dose and disposal and storage instructions. The pesticide use instructions communicated by the label tell the user how to use the product safely and effectively. The label essentially synthesizes the scientific data and conclusions to concise form that the farmer—generally a non-scientist—can understand.

Using a pesticide product in a manner inconsistent with its labeling is a violation of FIFRA punishable by civil and/or criminal penalties. See 7 U.S.C. 136j(a)(2)(G).

Likewise, FIFRA contains detailed procedures for cancellation of pesticides. 7 U.S.C. 136d. Pesticide registrations may be cancelled if the product "when used in accordance with widespread and commonly recognized practices, generally causes unreasonable adverse effects on the environment." 7 U.S.C. 136d(b).

As with registration, EPA weighs the relative merits of the risks of continued use with its benefits as the criterion for its decision.

Section 136d(b) also permits any person "adversely affected by the notice" of cancellation to request a hear-

ing before an Administrative Law Judge prior to final action being taken.

II. FIFRA PRE-EMPTS THE CASEY PESTICIDE ORDINANCE

As early as 1824 this Court recognized that state or local laws that "interfere with or are contrary to" federal law can be invalidated under the Supremacy Clause of the Constitution. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

Federal pre-emption can generally occur in either of two ways. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). First is the so called "field pre-emption" which occurs when Congress indicates its intent to occupy a given field. See *Pacific Gas & Electric Co., v. State Energy Resources Conservation & Dev. Commission*, 461 U.S. 1990 (1983).

As indicated above, "the amendments transformed FIFRA from a labeling law to a comprehensive regulatory statute." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 991 (1984). As amended, "FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority." *Id.* at 991-992.

This is the "field" of federal regulation of pesticides.

The second general manner of pre-emption occurs when a state or local law is in conflict with the federal law. This "conflict pre-emption" occurs when "it is impossible to comply with both state and federal law." See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-3 (1963). It may also occur when the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

To some extent, the areas of field pre-emption and conflict pre-emption overlap. If a state or local govern-

ment regulates in an area covered by federal regulation, and that local regulation imposes different regulatory criteria or standards, there will be some conflict with the federal law.

So it is with FIFRA and the Casey ordinance. The scheme set forth in FIFRA for the orderly administration and use of pesticides while concurrently protecting human and environmental values is put out of whack by the Casey ordinance. Similarly, the delineation of responsibilities of manufacturer, distributor and user, and the flow of information among them according to their respective positions, is destroyed by the Casey ordinance. The plain fact is that the Casey ordinance places a tremendous burden on the prospective pesticide user that obstructs the efficient management of FIFRA.

A. FIFRA Pre-Empts the Field Covered by the Casey Ordinance

Petitioners attempt to make much of the argument that the Town of Casey ordinance "addresses local conditions" and merely "supplements" the regulatory framework of FIFRA. An examination of the ordinance and a comparison with FIFRA clearly shows that it does neither. Instead, the ordinance is in reality a "mini FIFRA" that purports to empower the Town Board of Casey to independently make the same complex pesticide decisions regarding pesticide use that are made by the Environmental Protection Agency (EPA) at the federal level.

In order to determine whether the regulatory "fields" of FIFRA and the Casey ordinance overlap, it is necessary to examine the true effect of the Casey ordinance on the FIFRA comprehensive regulatory scheme.

The first conclusion that one draws from reading the Casey ordinance is that it is much more than just a public notification law of the type reviewed (and upheld) in *New York State Pesticide Coalition, Inc. v. Jorliny*,

874 F.2d 115 (2d Cir. 1989) and that part of the Boulder, Colorado ordinance that was upheld in *Coparr, Ltd. v. City of Boulder*, 735 F.Supp. 363 (D. Colo. 1989). While the Casey ordinance refers to a desire to restrict aerial application of pesticides, the local requirement of applying for a permit before *any* pesticide use and the voluminous information required to accompany the application make it much more comprehensive than the aerial spray ban considered in *Deukmejian v. County of Mendocino*, 683 P.2d 1150, (Cal. 1985).

The brief *amicus curiae* filed by the Village of Milford, Michigan, Mayfield Village, Ohio, and City of Boulder, Colorado in support of Petitioners impliedly recognizes the distinction between the nature of the Casey ordinance and notification ordinances. All three municipalities—purporting to have only the notification type ordinance—attempt to distance themselves from the more comprehensive Casey ordinance. At page 27 of their brief these *amici* state: “Given the cost and complexity of such [risk benefit] determinations, only a small portion of local pesticide laws, such as local bans on the use of particular pesticides or local permitting decisions that have the same effect, revisit these determinations, and thus only those laws would be pre-empted on the ground that they enter this field or conflict with federal regulation.”

Yet that sort of revisitation is precisely what the Casey ordinance does. And it is the Casey ordinance that is before the Court.

Rather than addressing local conditions, the ordinance is an independent pesticide regulatory scheme that stands alone without regard to federal or state pesticide standards.

First, it is clear from the ordinance and its preamble that the ordinance does not address local conditions, but is instead a method for limiting pesticide use altogether. Rather than setting forth any special local conditions to

be addressed, the preamble states the Town Board’s total opposition to pesticides:

“WHEREAS, the Town of Casey has previously indicated, by resolution, its strong opposition of pesticides;”

Moreover, the purported “risks” that the ordinance applies to the Town of Casey² are not local risks. The ordinance does not describe any purely local circumstances (such as abnormally low water table, special soil type, local climate conditions) that might differentiate the use of pesticides in the Town of Casey from any other locality. The local conditions that Petitioners cite as being appropriately addressed in local regulation are absent from the Casey ordinance.

By failing to mention any local conditions that might need to be addressed the ordinance seeks to address only general situations that are already the subject of federal regulation through FIFRA and implementing regulations.

Secondly, the information that the ordinance requires to be submitted with a pesticide use application is generally the same information that EPA requires of manufacturers in determining whether to register or cancel a pesticide. As indicated above, FIFRA requires that EPA weigh the risks and the benefits of the pesticide use in reaching a decision.

While not specific in describing the criteria to consider in passing on an application, the Town of Casey ordinance requests the same information. For example, section 1.3(2)(d) requires submission of “an inventory of the pesticide(s) to be used listing the brand name, generic component ingredients, the quantities to be used, method of application, *known benefits and know (sic) risks associated with the chemical(s) to be used . . .*” (Emphasis added)

² i.e., “WHEREAS, aerial spraying of pesticides in the Town of Casey has affected property beyond the boundaries of the target area as a result of drift and/or overspray;”

Likewise, section 1.3(2)(g) requires information on "the positive and negative effect of eliminating the use of the proposed pesticide(s) and of any chemical alternatives . . ." This appears to be merely a restatement of the risk benefit submission required in section 1.3(2)(d) above.

Whether it is called "risk-benefit" or "positive-negative effect," it is the same data that EPA considers in making pesticide decisions.

Yet those regulatory decisions have already been made by EPA. Federal registration of a pesticide and approval of a pesticide label by EPA means that EPA has weighed the risks and the benefits of the product, based on a consideration of volumes of test and laboratory data submitted by the manufacturer, and has found that the product can be used safely if used in accordance with the instructions found on the product label.

Not only does the Casey ordinance encompass the same subject matter as FIFRA, but the ordinance allows the Town Board to deny pesticide use altogether. This gives the Town Board authority to second guess the EPA decision to register and label a pesticide as safe-based on essentially the same data that EPA considered—and to even reach a contrary conclusion by denial of a pesticide use permit.

The ordinance is, therefore, not a measure that fills any gaps that FIFRA does not cover. Rather, it is a separate, independent pesticide regulatory scheme that is not tied in to either state or federal standards. The ordinance clearly authorizes the Town Board to make an independent evaluation of the submitted data and to make a decision on a pesticide use application on any grounds it wants. Further, the Board is clearly authorized to disagree with the state and federal decisions with regard to the pesticide by denying a pesticide use permit application. Moreover, the Town Board is given com-

plete discretion so that any findings or conclusions made at either the state or federal level about the pesticide in question need not be considered by the Town Board. With that complete discretion, the Town Board cannot be said to be acting pursuant to state pesticide policy or by delegation of authority from the state. The absence of a reference to state pesticide standards suggests a regulatory scheme that is independent of both state and federal laws.

Also, the hearing and appeal process in the ordinance is very similar to that spelled out in FIFRA (7 U.S.C. 136d). This provides further evidence that this ordinance is designed as a "mini-FIFRA" to regulate pesticide use independently of state or federal law. The fact that there are no decisionmaking criteria in the ordinance to guide the Board—such as the risk-benefit analysis required by FIFRA—reveals it as an independent regulatory scheme.

To demonstrate the overlap in the regulated "fields" and the independence of the Casey scheme, we need only consider the following:

If the Court were to find for Petitioners in this case and find that local communities could enact pesticide ordinances like the that at issue here, there would be no further need for either FIFRA or state pesticide laws. Each local governing body would be able to regulate pesticides as it pleases according to its own wishes.

B. The Casey Ordinance Is Pre-Empted Because It Is in Conflict With FIFRA

Federal law may also pre-empt state or local regulation if the local regulation is in conflict with the federal law. See *Louisiana Public Service Commission v. F.C.C.*, 476 U.S. 355 (1986). Local regulation may be in conflict with federal law where it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Hines v. Davidowitz*, *supra*, at p. 67.

The Casey ordinance frustrates FIFRA's comprehensive pesticide regulatory scheme in a number of ways. It regulates pesticides without requiring compliance with FIFRA standards, it makes pesticide use overly burdensome and it leaves production agriculture vulnerable to serious pest infestations. Each of these results "stands as an obstacle" to the accomplishment of the goals of FIFRA.

1. The Ordinance Permits Pesticide Use Decisions Without Regard to Federal Standards

One of the express, overriding purposes of a comprehensive federal pesticide regulatory program is to achieve a uniformity of regulations. Section 136t(b) requires state and local governments to cooperate with EPA to achieve this uniformity. The Casey ordinance does the opposite. FIFRA recognizes that pesticide use has many benefits for the production of food in the United States,³ as well as the fact that some products might cause certain risks. Through FIFRA, Congress "implemented a comprehensive framework that balances agricultural and environmental concerns." *Defenders of Wildlife v. Administrator*, supra at 1298. At 7 U.S.C. 136a, the EPA is required to weigh and consider the benefits and the risks of pesticides in deciding whether to register a pesticide. At 7 U.S.C. 136d EPA weighs the benefits and risks in determining whether to cancel a pesticide use. "The EPA, in reviewing registrations and applications for registrations, strikes this balance in every case." *Defenders of Wildlife*, supra at 1299.

The Casey ordinance does not strike this balance in any case. Unlike FIFRA's risk-benefit requirement, the Casey ordinance contains no review standards at all. The ordinance permits the Casey Town Board to undercut the risk-benefit requirements of FIFRA completely.

³ See *U.S. Code Cong. & Admin. News*, Vol. 3, p. 3995.

Furthermore, FIFRA's regulatory scheme indicates that pesticide registration, use and cancellation decisions be made on the basis of scientific review. Sections 136a and 136d provide for the submission of comprehensive scientific data for review by EPA scientists.

The Senate Committee on Agriculture & Forestry noted that "few, if any, local authorities whether towns, counties, villages, or municipalities have the financial wherewithall to provide necessary expert regulation comparable with that provided by the state and federal governments."⁴

The clear message is that pesticide decisions are to be based on the ability to regulate and sound science, not on emotion.

The Casey ordinance frustrates this federal regulatory purpose. While the ordinance requires the submission of an extensive amount of information, it also provides that the three member Town Board make a decision within 15 days of submission. (Casey Ord. 1.3(3)). That time frame would be extremely tight for three scientists working full time to review and analyze the data. For three town residents who may or may not be scientists and who probably have other employment, this time schedule makes it impossible to base a permit decision on sound science.

Similar ordinances in the thousands of localities across the country would destroy the uniformity of regulation that FIFRA strives to achieve. Instead of science based pesticide regulation, use would be regulated according to community whim. Instead of carefully considering the benefits and risks of a product, use decisions would be made on whatever basis the community desired.

In other words, FIFRA's goals would be completely frustrated.

⁴ 1972 *U.S. Code Cong. & Admin. News*, Vol. 3, p. 4008.

2. *The Information Requirements of Local Ordinances Such As the Casey Ordinance Are Unduly Burdensome to Farmers and Ranchers*

The Casey ordinance further frustrates the goals of FIFRA by making it unduly burdensome for farmers and ranchers to comply. The Casey ordinance requires pesticide use applicants to submit substantial technical information about the pesticide along with the application. Such information includes: risks and benefits of the pesticide, its generic ingredients, all viable alternatives, positive and negative effects of reducing or eliminating the use, anticipated impacts on man and the environment, and the status of the product in EPA's re-registration, special review and other EPA programs.

This is essentially the same kind of information that FIFRA requires the EPA to collect and evaluate in making pesticide decisions. While the ordinance does not describe the specificity of the information required, the amount of information to be submitted with the pesticide use application is nevertheless quite substantial.

In the case of FIFRA, the product registrant—usually the manufacturer—must file the required data. 7 U.S.C. 136a. The registrant is the one who has conducted the requisite tests and who has both the best knowledge of the product and also has control of the required information.

The Casey ordinance, on the other hand, requires the pesticide use applicant to submit what amounts to the same type of information required by EPA for registration. Many farmers and ranchers apply their own product if they have been certified by the state to do so. Unlike the product registrant, individual farmer applicators generally have little toxicological background and do not have access to the type of information that ordinances like the Casey ordinance require. This makes it almost impossible for applicants to comply with the Casey ordinance.

Farmers and ranchers receive directions for use, storage and disposal of a particular product through the product labeling. As defined, a product label "means the written printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." 7 U.S.C. 136(p)(1). Pesticide labeling is part of the information required to be submitted during registration (7 U.S.C. 136a(c)(1)(C)) and also will distinguish whether a product is for "general" or "restricted" use. (7 U.S.C. 136a(d)). Use of a product "in a manner inconsistent with its labeling" subjects violators to civil and criminal penalties (7 U.S.C. 136(ee)).

Most of the information required by the Casey and similar ordinances is not found on the label. Farmers, ranchers and other end users of a particular product who would be required to submit this information do not have it available nor do they have ready access to it. Even commercial applicators do not generally have all the type of information required. For example, the various EPA status reports that the ordinance requires can only be supplied by EPA. Similarly, the risk-benefit and other health, safety and environmental information required is also most readily available from EPA. To require pesticide use applicants to provide this information for every intended pesticide application places not only an undue burden on users, but potentially also the EPA.

Finally, such data requirements from one local jurisdiction are burdensome enough. However, if each local jurisdiction is permitted to require its own information on its own forms, with its own waiting requirements, the situation becomes impossible for producers farming within two or more local jurisdictions.

3. *The 60 Day Notice Requirement Makes It Impossible to Respond to Emergency Situations*

Pesticide users are often forced to respond to emergency situations in which a particular pest rapidly infests an area. FIFRA section 18 (7 U.S.C. 136p) al-

lows the EPA to exempt federal or state agencies from the other provisions of FIFRA in order to respond to the emergency. Such emergency situations can either be a specific emergency that threatens significant economic or environmental loss, a quarantine required to stop new pest species from spreading, threats to public health, or in a crisis situation that might involve any one of the other three situations. See 40 C.F.R. 166.2.

The Casey permit procedure fails to address any of these situations. The cumbersome application procedure coupled with the 60 day notice requirement disables the Town of Casey from responding to any emergency situation and frustrates the federal response.

There is a very real conflict between FIFRA section 18 and the Casey 60 day notice requirement. If the Casey ordinance is allowed to stand, there is no assurance that either the state or federal authorities could respond to any type of emergency.

For farmers and ranchers, there are some pest control methodologies that utilize pesticides only when pest populations reach certain levels in a specific field.

One such method known as Integrated Pest Management (IPM) uses a wide range of control methods to achieve pest control. Under IPM, pesticide use would only take place when the weed or pest reaches certain levels in the field. Treatment is based on need and is critically timed treatment.

Under IPM techniques, fields are closely monitored for weed and pest levels. When a certain level of pest or weed density is reached, one application of a product will act to control the weed or pest. However, even for those weeds or pests that might recur annually, there is no way of a farmer or rancher knowing when that critical level might be reached. Often, farmers and ranchers have only 24 hours notice to apply pesticides under the IPM system. The 60 day notice requirement

and its burdensome application requirements make IPM unavailable as an alternative practice.

However, even if a local ordinance did not contain a 60 day requirement, a neighboring jurisdiction might include such a provision or might include provisions that would unduly restrict pesticides critical to IPM practices. This could prevent producers whose property is in more than one jurisdiction from using IPM.

Also, local ordinances such as Casey's prevent the treatment of weeds and pests thus creating breeding grounds and overpopulation of those weeds and pests leading to the type of emergency situations addressed in FIFRA.

III. THE LEGISLATIVE LANGUAGE AND LEGISLATIVE HISTORY OF FIFRA CLEARLY INDICATE FEDERAL PRE-EMPTION OF THE CASEY ORDINANCE

Whether or not a certain action is pre-empted by federal law is a matter of Congressional intent. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). To discern that intent this Court examines the explicit statutory language and "the structure and purpose of the statute." *FMC Corp. v. Holliday*, 498 U.S. — (1990). Based on these principles, the Wisconsin Supreme Court correctly concluded that the Casey ordinance was pre-empted by FIFRA.

A. The Structure and Purpose of FIFRA Requires Pre-Emption of the Casey Ordinance

While FIFRA expressly allows states to enact pesticide regulations in addition to FIFRA (7 U.S.C. 136v), that same authority does not extend to local governments. "State" is defined in FIFRA at 7 U.S.C. 136(aa):

"The term 'state' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the

Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa."

While 7 U.S.C. 136v does not specifically refer to local governmental entities, other sections of FIFRA do. Thus, "any state or political subdivision" may inspect records of pesticide dealers (7 U.S.C. 136f(b)). Similarly 7 U.S.C. 136r(b) and (c) provides a plan for monitoring pesticides "in cooperation with other Federal, State or local agencies." Both of these sections specifically include local agencies or political subdivisions *as well as* State agencies.

Where Congress includes particular language in one section of a statute and omits it in another part, the general presumption is that Congress acted intentionally and purposely. See *Russello v. United States*, 464 U.S. 16, 23 (1983). With regard to the present issue of the definition of "State," "one would need look no further than the Eleventh and Fourteenth Amendments to the Constitution to find radically different usages of that term." *Professional Lawn Care Association supra*, at 941 (Nelson concurring). As used in the Fourteenth Amendment, the term includes political subdivisions, whereas in the Eleventh Amendment it does not.

The fact that the language of 7 U.S.C. 136v does not refer to "political subdivisions" or other such language does not, as Petitioners suggest, wrap the issue with uncertainty. Rather, where such language is used elsewhere in FIFRA, its omission in section 136v must be construed as purposeful.

Likewise, the structure and intent of FIFRA suggest pre-emption of local ordinances like that of Casey. As indicated above, FIFRA is a comprehensive pesticide regulation statute that was amended in 1972 to increase federal pesticide jurisdiction.⁵ The statute set specific

⁵ One of the main purposes of the 1972 amendments was to bring pesticides distributed entirely within a State under federal jurisdic-

procedures and criteria for EPA to follow from pesticide registration and labeling to cancellation. It describes what kinds of data EPA may require and how it should be analyzed.

FIFRA also recognizes that EPA has the resources and the expertise to analyze the voluminous data required to be submitted with pesticide applications and make the complex decisions that have to be made. The Congress has funded EPA to permit the agency to have the scientific expertise to make these complex decisions. That scientific expertise and the careful analysis of risks and benefits crafted into FIFRA would be lost if the ordinance were upheld. Instead, pesticide use decisions would be made on the basis of political rather than scientific considerations, and by local, non-scientific governing bodies rather than trained scientists.

Further, FIFRA contemplates a fairly uniform system of pesticide regulation (see 7 U.S.C. 136t(b)). That goal cannot be achieved if local governments are allowed to regulate pesticides. The Casey ordinance makes no reference to federal or state pesticide regulation standards as a criterion in determining whether or not to grant an application. The ordinance allows the Town to make its own independent decision on pesticide use without regard to what the state or federal agencies have determined about the pesticide. Should the Casey ordinance be upheld, every Town Board of every municipality or other local agency across the country would be free to establish an independent pesticide regulatory scheme that does not necessarily have to draw upon the scientific expertise of EPA or of the state pesticide agency to help or guide its decisionmaking. Instead of "uniformity of regulations," the result would be regulatory chaos.

tion. Sen. Rep. No. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News, 3993, 3996.

B. The Legislative History of the 1972 FIFRA Amendments Clearly Shows Pre-Emption of Local Pesticide Regulation

An examination of legislative history is relevant in determining the meaning and purpose of a statute. *Silkwood v. McGee Corp.*, 464 U.S. 238 (1984) and *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983). This Court has long acknowledged that "[r]eports to Congress accompanying the introduction of proposed law may aid the courts in reaching the true meaning of the legislation in cases of doubtful interpretation." *Caminetti v. United States*, 242 U.S. 470, 490 (1917). While the legislative history should never substitute for express statutory language, "resort to *bona fide* legislative history is always permissible and may sometimes be helpful." *Professional Law Care Association*, *supra* at 940 (Nelson concurring).

Petitioners attempt to cloud the clear meaning of the legislative history of the 1972 FIFRA amendments, downplaying each Congressional expression of local pre-emption in the process. Being unable to return to 1972, the legislative history is all that we have to ascertain Congressional intent absent clear statutory language. If legislative history means anything as an aid to statutory interpretation, the history surrounding enactment of FIFRA in 1972 must be construed as providing pre-emption of local pesticide regulation. All of the circumstances point to that conclusion.

The original legislative package from President Nixon in 1971 (H.R. 4152) contained a forerunner to section 136v that specifically provided that both states and political subdivisions could regulate pesticides. See *Maryland Pest Control v. Montgomery County*, 646 F. Supp. 109, 111-112 (D. Md. 1986).

In reporting the bill to the full House, the House Agriculture Committee deleted the reference to political subdivisions, stating:

"The Committee rejected a proposal which would have permitted political subdivisions to further regulate pesticides on the grounds that the 50 States and the Federal Government should provide an adequate number of regulatory jurisdictions."⁶

The bill (now H.R. 10729) passed the House of Representatives on November 9, 1971.⁷

The bill then went to the Senate Committee on Agriculture and Forestry. That Committee expressly agreed with the House Agriculture Committee, and in its Report it stated that "it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides."⁸

To this point in the history of the 1972 FIFRA amendments there can be no doubt that the idea of local pesticide regulation had been specifically and categorically rejected at every stage in the legislative process.

The Senate Commerce Committee also asserted jurisdiction over the bill. It proposed a series of amendments to H.R. 10729 that included a provision allowing local regulation of pesticides. The Senate committee on Agriculture and Forestry objected to these amendments and filed a Supplemental Report that stated that "regulation by the Federal government and the 50 States should be sufficient and should pre-empt the field." 1972 *U.S. Code Cong. & Admin. News*, Vol. 3, 4026.

Both Committees met to thrash out a compromise. After nearly two months, a compromise bill was reached. *Id.* at 4088.

⁶ H.R. Rept. No. 92-511, p. 16.

⁷ See *U.S. Code Cong. & Admin. News*, Vol. 3, 1972, p. 3993.

⁸ S. Rep. No. 92-838, 92nd Cong., 2d Sess., quoted in *Mortier, et al. v. Town of Casey, et al.*, 452 N.W. 2d 555 (1990).

The description of the compromise that was reached is set forth in 1972 *U.S. Code & Cong. & Admin. News*, Vol. 3, p. 4089-4092. That explanation specifically states:

"Commerce Committee amendments 4 (penalties), 8 (hearing structure), 10 (*authority of local governments to regulate the use of pesticides*), 12 (authority of states to register pesticides), 13 (record-keeping by private applicators) and 14 (right of entry) are not included in the substitute." (Emphasis added) *Id.* at 4091.

Again, to this point there is no confusion about Congressional intent. The debate between the two affected committees over FIFRA resulted in a compromise in which each side conceded some points. As clearly indicated, the Commerce Committee receded from its position on local pesticide regulation.

The original Commerce Committee amendments, including the local regulation amendment, were offered on the Senate floor during debate on FIFRA. A motion was adopted to withdraw those amendments and substitute the compromise bill. The full Senate approved the compromise bill.

Since neither the final House bill nor the final Senate bill had a local regulation provision, the issue was not discussed in Conference.

Petitioners have no answer for this clear expression of Congressional intent. Instead, they argue that the Senate merely "agreed to disagree" about the issue without resolving it. Their position ignores the express consideration and defeat of the very language Petitioners support. Contrary to their assertions, the pre-emption issue was not "tabled" by the Committee compromise. Rather, as the joint report indicates, it was deliberately omitted from the compromise bill during deliberations. Further, the issue was raised again on the Senate floor, and defeated once again in favor of the Committee compromise substitute bill.

These circumstances do not indicate Congressional uncertainty. The lack of specific pre-emptive language does not create ambiguity. Instead, it indicates defeat. The record clearly shows that attempts to carve out a legislative exception for local pesticide regulation from this comprehensive federal statute were defeated in both chambers of Congress with full understanding of what they were doing.

As the *amicus curiae* brief of the United States indicates, "there are some strong and directly relevant committee statements favoring pre-emption of local regulation. . ."

The Wisconsin Supreme Court was correct in concluding that the legislative history of FIFRA is very clear that Congress intended to pre-empt local pesticide regulation of the type at issue in this case. The American Farm Bureau Federation urges this Court to find pre-emption as well.

CONCLUSION

Through FIFRA, Congress enacted a comprehensive framework of pesticide regulation. This framework provides for the balancing of the risks and the benefits of a particular product, and provides systematic procedures for registration, labeling, use and cancellation of pesticides.

The Casey ordinance is one local government's attempt to cast FIFRA aside and establish its own independent system of pesticide regulation. Instead of the carefully crafted risk-benefit analysis set forth in FIFRA, the Casey Town Board would be able to grant or deny pesticide use for any reason it wants.

There are thousands of local entities like Casey across the United States. If each of those entities were able to enact ordinances similar to that of Casey, there would no longer be any need for FIFRA or state pesticide laws. Everything would be regulated at the local level. The

result would be regulatory chaos from one jurisdiction to another.

The very reasons that FIFRA was enacted in the first place require that the Wisconsin Supreme Court decision be affirmed. Uniformity of pesticide regulations is necessary in order to provide a degree of certainty to farmers and ranchers that they can protect their crops in a coordinated manner, especially when their farms or ranches cross local jurisdictional boundaries.

Pre-emption of the Casey ordinance also assures that pesticide use decisions are made on the basis of scientific scrutiny. Local governments do not generally have the scientific expertise required to make the complex pesticide decisions that FIFRA requires.

The comprehensive, scientific and coordinated regulatory framework that FIFRA seeks to achieve will no longer exist if the Casey ordinance is allowed to stand.

Both the law and the legislative history of the 1972 FIFRA amendments clearly indicate that FIFRA pre-empts ordinances such as that of Casey.

The decision of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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